IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Smt. Vimla.
vs.
Nemi Chand.

S.B.CIVIL SECOND APPEAL NO.392/2005 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 17.12.2003 PASSED BY SHRI TARA CHAND SONI, ADDITIONAL DISTRICT JUDGE NO.1, JODHPUR IN CIVIL APPEAL DECREE NO.64/2000.

DATE OF JUDGMENT ::: 6.4.2007

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. RK Soni, for the appellant.
None present for the respondent.

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BY THE COURT:

Heard learned counsel for the appellant as nobody appeared on behalf of the respondent despite service.

The trial court granted prohibitory injunction

against the defendant/appellant in the suit filed by the plaintiff/respondent. The first appellate court upheld the trial court's decree so far as prohibitory injunction is concerned but also granted mandatory injunction directing the appellant to reconstruct the drain which was coming from the plaintiff's house and from which the plaintiff used to discharge his water etc. from his house.

The grievance of the appellant now is that the decree holder is insisting that the drain should be open and not a closed underground drain.

According to learned counsel for the appellant, subsequently all the drains in the nearby area have been closed and underground drains have been constructed by the Municipal Corporation, Jodhpur so as to avoid public nuisance. According to learned counsel for the appellant at present on spot, already appropriate arrangements have been made for discharge of filthy water from the house of the plaintiff by covering drain. According to learned counsel for the appellant, still the plaintiff/decree holder is insisting for execution of the decree that the appellant/judgment debtor should reconstruct the drain which was in existence and according to the appellant, that was an open drain.

It is also submitted that though the decree of the

appellate court dated 17.12.2003 is only to the effect issuing direction to the appellant to reconstruct the drain for the plaintiff but that drain can be closed drain also. It is also submitted that the plaintiff cannot insist for keeping the drain open as that will cause nuisance.

I considered the submission of learned counsel for the appellant and perused the reasons given by the two courts below.

The appellant has also placed on record an application under Order 6 Rule 17 CPC seeking amendment in the written statement and has also submitted an application under Order 41 Rule 27 CPC and produced the photographs of the location where the drain was there and the plaintiff is seeking reconstruction of the drain.

The plaintiff's right was only to his right of discharge of water from the drain and if there may be better mode of providing this facility which in present days is appropriate, then the relief can be molded accordingly. Even if in the decree, it is not mentioned that where the drain of same shape, size or measurement with same length is required to be reconstructed by the defendant, then also, the plaintiff can ask for relief in the execution only which serves the purpose for

which the suit was filed and not insist for relief mechanically insisting for keeping something which by passing of time may not remain appropriate. The decree nowhere says that the drain should be open and it must be as per the wish of the plaintiff only. The appellant if is facing execution of the decree, then he can certainly submit before the executing court both the points that the drain has already been constructed by whosoever it may be and, therefore, nothing remained to be done under decree dated 17.12.2003 by the appellant. If there is no drain, as submitted by the appellant on spot at present, then the appellant can certainly construct closed drain and for that the executing court can appoint appropriate Commissioner to see that the plaintiff gets relief of discharge of filthy water etc. from his house without there being any inconvenience and that will be the true import of the decree and real relief to the plaintiff.

With these observations, this appeal is disposed of and, therefore, no need to decide the applications under Order 6 Rule 17 and Order 41 Rule 27 CPC.

(PRAKASH TATIA), J.

S.Phophaliya